IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 981 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE AKIL KURESHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

A.D.VYAS

Versus

BAR COUNCIL OF GUJARAT

Appearance:

1. Special Civil Application No. 981 of 2005

MR PARESH UPADHYAY with

MR VAIBHAV A VYAS for Petitioner No. 1

MR CG GOVINDAN for MR AK CLERK for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE AKIL KURESHI

Date of decision: 25/04/2005

ORAL JUDGEMENT

RULE. Mr.Govindan for Mr.Clerk, learned advocate waives service of notice of rule on behalf of the

respondent. At the joint request of the parties, this matter is taken up for final disposal today.

In the present petition, the petitioner has challenged the action of the respondent in not paying him subsistence allowance as well as the actual salary for certain period. The petitioner has also challenged the action of the respondents in seeking to recover alleged excess payment made to the petitioner from subsistence allowance payable to him.

It is the case of the petitioner and with which there is no serious dispute that the petitioner was arrested on 23-6-2004 on account of a criminal case filed against him by the respondent involving allegations of misappropriation and fraud. The petitioner was in custody right upto 1st November, 2004. After being released on bail, the petitioner reported for duty on 3rd November, 2004. He was, however, served with the suspension order dated 18-10-2004. The case of the petitioner is that he has not been paid any salary or subsistence allowance whatsoever from 1st March, 2004 onwards. The case of the petitioner is that he has applied for leave from 1st March, 2004 to 22nd June, 2004. Such applications have not been disposed of by the respondent.

The respondent opposed the petition on various grounds. It is mainly contended that the petitioner was earlier placed in the higher pay scale of Rs.15,000-375-18000/-. Subsequently, the mistake was corrected and the petitioner is now placed in the correct pay scale of Rs.8000-13,500/-. It is the case of the respondent that on account of said error, the petitioner is paid salary in excess of his entitlement and a total amount of Rs.90,000/- is required to be recovered from the petitioner. It is pointed out that the petitioner had earlier agreed for a recovery of Rs.3,000/- per month from his salary. It is stated that on account of the said recovery, the petitioner has not been paid any subsistence allowance and his entitlement of subsistence allowance is being adjusted towards recovery.

As noted earlier, it is not in dispute that the petitioner is placed under suspension. His relationship of servant and master with the respondent, therefore, subsists. Under the Service Rules, he would not be in a position to accept alternative employment and thereby earn livelihood. On one hand when the petitioner is pinned down with the service conditions which do not permit him to seek alternative employment being in

service with the respondent, though under suspension, and on the other hand the entire subsistence allowance is being adjusted towards recovery. This would not be permissible. In the facts of the present case, I therefore find that though a reasonable recovery may be permissible to the respondent from the entitlement of the petitioner, the petitioner must receive some amount, which would enable him to sustain himself and his family. I am told that under the Service Rules, the petitioner would be entitled to receive subsistence allowance at the rate of 50% of his salary. It is therefore held that the petitioner would be entitled to receive subsistence allowance. Considering the facts of the case, since the petitioner was earlier permitting recovery at the rate of Rs.3000/- per month from his salary, it is provided that it will be open for the respondent to recover Rs.1500/- per month from the subsistence allowance payable to the petitioner till the entire amount of alleged excess payment is recovered. The petitioner was kept in custody from 23rd June, 2004. At any rate, respondents cannot withhold both salary as well as subsistence allowance from 23rd June, 2004 onwards. In that view of the matter though actual order of suspension is passed on 18th October, 2004, the petitioner would be entitled to receive subsistence allowance from 23rd June, 2004, even if a deeming fiction is created whereby he is deemed to be under suspension upon his arrest. For the period between 1st March, 2004 to 23rd June, 2004 the leave applications of the petitioner shall be considered by the respondent and if allowed, the petitioner shall receive salary for the said period.

Accordingly, it is directed that the respondent shall pay subsistence allowance to the petitioner from 23rd June, 2004, at the permissible rate, out of which monthly deduction of Rs.1500/- would be permissible to be deducted towards recovery of alleged excess payment of salary. The question of salary for the period between 1st March, 2004 to 23rd June, 2004, shall be governed by the decision of the respondent on the leave applications of the petitioner. Above directions shall be carried out within a period of four weeks from the date of receipt of copy of this order.

Nothing said in this order will decide the rights of the parties to recover the alleged excess payment made to the petitioner.

With these directions, the petition is disposed of. Rule is made absolute to the above extent. No order as to costs.

Direct service is permitted.

(AKIL KURESHI, J.)

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